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The Constitution of the United States Applies to Indian Tribes

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THE CONSTITUTION OF THE UNITED STATES APPLIES TO INDIAN TRIBES

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I. ISSUE

The scope of Indian jurisdiction has again been addressed by the United States Supreme Court in *Strate v. A-1 Contractors*.[1] *Strate* held that the tribal court of the Fort Berthold Indian Reservation could not exercise jurisdiction with respect to an automobile accident that occurred on the reservation. However, the Court's analysis did not preclude tribal court jurisdiction over non-Indians. The extent of Indian jurisdiction and the procedures by which it is determined has been a frequent subject of Supreme Court opinions.[2] The extent of Indian jurisdiction, both regulatory and judicial, is hotly contested because of the general perception that Indian tribes and their courts are not subject to the United States Constitution, and thus due process, equal protection, and other constitutional protections are not available to the constituents and litigants. This article addresses the validity of that perception.

How can it be that within the borders of the United States, citizens—both Indian citizens and non-Indian citizens—of the United States may be subject to unconstitutional actions by tribal governments and tribal courts?[3] Whether tribes do, in fact, provide protections of the Constitution, many apparently do not believe that they have any obligation to do so.[4] In the book

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1. 117 S. Ct. 1404 (1997). This article is not about Indian jurisdiction (either regulatory or adjudicatory) per se. Rather, it is about the existence of constitutional constraints upon tribal jurisdiction for those matters where a tribe, in fact, has regulatory or adjudicatory jurisdiction. The diminishment and the elimination of Indian jurisdiction, however, is an essential part of the thesis of this article, in that jurisdiction is the power to decide and the power to legislate. Thus, a diminishment or elimination of tribal jurisdiction by Congress or the courts is a diminishment or elimination of retained tribal power and related, retained sovereignty.

2. *Strate v. A-1 Contractors*, itself, cites over half a dozen of the Court's own cases relating to the scope and procedures of tribal jurisdiction decided within the last twenty years. The power of tribes and the limitations on that power has become an everyday issue for those living on or near reservations.

3. This is the generic question the author has been asked many times in many forms by clients and others.

4. *See* AMERICAN INDIAN LAW DESKBOOK 165 (Julie Wrend & Clay Smith, eds.,

Killing the White Man's Indian, a lawyer—who is an Indian and a tribal member—is quoted:

> Tribes are able to deny fundamental rights in tribal court and then hide behind the principle of sovereignty. They have the power to do anything they want to do. Many tribal court decisions have nothing to do with fairness . . . .[5]

The perception that the Constitution of the United States does not apply to tribal governments originates with the 1896 Supreme Court decision *Talton v. Mayes*.[6] In *Talton* the Supreme Court reviewed a situation in which one Cherokee Indian was charged with the murder of another Cherokee Indian within Cherokee territory. The Court held that the Indian defendant could not object to the manner in which the tribal grand jury was impaneled on the grounds that it violated the Fifth Amendment to the Constitution. The Court declared that its opinion rested on the origin of the tribe's power, which was the Cherokee Nation—not the United States. In other words, the offense was against the tribe, and the power to punish the offense was within the powers which, at the time, had been retained by the tribe.[7] The Court held that the tribe was not subject to the Con-

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1993). "Hearings held before the United States commission on Civil Rights concerning ICRA [Indian Civil Rights Act] enforcement included allegations of repeated due process violations by tribes [and] allegations that tribal officials control or manipulate judicial opinions . . . ." *Id.*

5. FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE CENTURY 314 (1996).

6. 163 U.S. 376 (1896). *Talton* has been historically cited by the Supreme Court for this proposition. For example, *Oliphant v. Suquamish Indian Tribe* cites *Talton v. Mayes* for the proposition that the Bill of Rights does not apply to Indian tribal governments. *See Oliphant*, 435 U.S. 191, 194 n.3 (1978) (citing Talton v. Mayes, 163 U.S. 376 (1896)). This statement is dicta because the Court held that Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 664 n.11 (Rennard Strickland & Charles F. Wilkinson, eds., Miche 1982) (1942) [hereinafter COHEN (Strickland ed.)] (citing *Talton* for the proposition that Indian tribes are not bound by Constitutional limitations).

It does not, however, appear that *Talton* has been critically analyzed in over 100 years. It may or may not be of interest that the Supreme Court decided *Talton* on the same day that it decided *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that "separate but equal" satisfied the Fourteenth Amendment).

7. The Court referred to the 1866 treaty with the Tribe which provided that:

> The judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the Nation . . . shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty.

Talton, 163 U.S. at 380-81.

stitution, because it was acting upon its retained powers (or retained sovereignty).[8]

This article examines whether the holding in *Talton*, and the cases that rely on *Talton*, are still valid in light of the fact that Indians and Indian reservations were integrated and assimilated into the United States by congressional, judicial, and other actions. Furthermore, this article examines the constitutional restrictions and presumptions imposed on Congress when it acted to reverse this tribal integration and assimilation.

II. THESIS

The perception that the Constitution does not apply to Indian tribes is derived from the assumption that Indian tribes have retained some element of their original sovereignty. If tribes have retained original sovereignty, the *Talton* Court reasoned, then tribes have power to govern—a power not granted by the United States—and thus, not subject to the Constitution. However, this article will show that, by virtue of their assimilation into the United States, Indian tribes have lost all of their retained powers that are inconsistent with the rights of citizens of the United States. The powers tribes have with respect to citizens originate with the United States and are, therefore, subject to the Constitution of the United States.

Courts have consistently held that the United States—specifically Congress—has plenary,[9] or absolute, power over Indian tribes.[10] This plenary power subjects tribes' retained sovereignty to complete defeasance. Congress has engaged in a course of legislative conduct with respect to Indian nations and Indian tribes that has resulted in the complete defeasance of retained tribal power and retained sovereignty.[11]

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8. The Court stated in its analysis:

> The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee Nation is, therefore, clearly not an offense against the United States, but an offense against the local laws of the Cherokee Nation . . . .

Id. at 381.

> It follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the constitution on the national government.

Id. at 384.

9. Plenary is defined as "full, entire, complete, absolute, perfect, unqualified." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990).

10. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 319 (1978) (discussed *infra* Part III.B.).

11. Significantly, a number of Supreme Court cases indicate, generally in dicta,

Legislative examples of such conduct include: Acts granting citizenship to Indians; Acts providing for the allotment of Indian lands and reservations; and Acts eliminating the status of tribes as independent nations and powers. By granting citizenship to tribal members, Congress gave them the same constitutional rights as other citizens. By enacting the Allotment Acts and other Acts discussed herein, Congress intended to abolish tribes and reservations.

To the extent that Congress, by the Indian Reorganization Act (Wheeler-Howard Act) of 1934[12] and other legislation,[13] attempted to revive tribal sovereignty, it was precluded from providing for the creation of any tribal governments or tribal judicial systems that do not comport with the Constitution of the United States. Because of the *de facto* integration of Indian and non-Indian cultures on reservations, to the extent that Congress has not acted or has not acted properly, the Constitution is self-implementing. Thus, within the borders of the United States, citizens—both Indian citizens and non-Indian citizens—are entitled to the protection of their constitutional rights, and courts have the power to take affirmative action to provide for that protection.

III. ANALYSIS

A. *Retained Sovereignty and Inherent Powers of Indian Tribes*

The inherent sovereignty of tribes existed before their integration into the United States.[14] *Talton* reasoned that this sovereignty preceded the Constitution, and thus was not affected by the Constitution.[15] The Supreme Court viewed tribes as initially being "domestic dependent nations."[16] By virtue of their initial integration into the United States, tribes lost some of their in-

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that Indian tribes have retained sovereignty to some extent with respect to various issues. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). While the validity of the references to retained sovereignty in this case and many others are questioned by the thesis of this article, there do not appear to be any cases in which the Supreme Court has specifically determined that the retained sovereignty has survived the congressional and other actions discussed in this article.

12. 25 U.S.C. §§ 461-479 (1994).

13. *See, e.g.*, 25 U.S.C. § 1301-1303 (1994).

14. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

15. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896). "It follows that, as the powers of local self-government enjoyed by the Cherokee nation existed prior to the constitution, they are not operated upon by the fifth amendment . . . ." *Id.*

16. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

herent sovereignty.[17] Through acts of Congress, tribes lost their retained sovereignty—that is, the sovereignty which preceded the Constitution of the United States. This does not mean that tribes are no longer sovereign. Rather, the retained sovereignty that the tribes lost by integration into the United States and by congressional action has been replaced, in part, by sovereign powers[18] granted to tribes by Congress. The sovereign powers that tribes now possess, including inherent powers,[19] flow from congressional action and are therefore subject to the Constitution.

B. The Plenary Power of Congress with Respect to Indian Tribes

The essential holding in *Talton* is that the Constitution did not apply to the retained sovereignty of the Cherokee tribes.[20] Congress has the power to eliminate any retained sovereignty of Indian tribes that is inconsistent with the Constitution, and it has done so. Congress has accomplished this through numerous actions in exercise of its plenary power over Indian tribes. The power of Congress to control and govern Indians and tribes is without question.[21]

Congress has the power to completely eliminate Indian sovereignty. The Supreme Court recognized this power in *United*

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17. *See* Montana v. United States, 450 U.S. 544, 563-64 (1981).

18. The power to govern "includes all the specific powers necessary to accomplish the legitimate ends and purposes of government." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

19. Inherent powers are those powers necessary to implement the specific powers which have been granted. These powers were recognized by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 323-24 (1819), as they applied to the federal government. These powers are limited, however, by the Constitution. *See id.* at 323. The inherent powers which tribes would have as the result of congressional action would be very narrow:

> But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana, 450 U.S. at 564.

20. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896).

21. The power to govern and to legislate which arises from the fact of possession of territory was articulated by Chief Justice Marshall in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542-43 (1828). It was expressly applied to Indians, who were within the geographical limits of the United States, by the Court in *United States v. Kagama*, 118 U.S. 375, 379-81 (1886). The Court has also indicated that the basis of Congress' power over tribes and Indians is the Commerce Clause. *See* McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 172 n.7 (1973).

States v. Wheeler:[22]

> Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." Their incorporation within the territory of the United States, and *their acceptance of its protection*, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others . . . .
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> . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is *subject to complete defeasance*.[23]

In *Merrion v. Jicarilla Apache Tribe*,[24] the Supreme Court indicated that Congress had plenary authority to limit tribal sovereignty. Chief Justice Fuller in *Stephens v. Cherokee Nation*,[25] indicated that Congress possessed "plenary power of legislation in regard to [tribes], subject only to the Constitution of the United States."[26] Congress, in the exercise of its power with respect to tribes, is not bound by treaties with the tribes, since it may supersede or abrogate them.[27]

An example of the extent of Congress' power is demonstrated in *Negonsott v. Samuels*.[28] There, the Supreme Court again recognized the plenary authority of Congress.[29] It considered the Kansas Act[30] and held that Congress had granted criminal jurisdiction to the state of Kansas for all offenses involving Indians on Indian reservations within the state.[31] Moreover, *Talton* itself recognized that the retained tribal sovereignty was "subject always to the paramount authority of the United States."[32] However, *Talton* held that Congress had not (yet) acted to eliminate retained tribal sovereignty.[33] The Court indicated that the

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22. 435 U.S. 313 (1978).
23. *Wheeler*, 435 U.S. at 323 (citations omitted) (emphasis added).
24. 455 U.S. 130, 146 (1982).
25. 174 U.S. 445 (1899).
26. *Stephens*, 174 U.S. at 478.
27. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871).
28. 507 U.S. 99 (1993).
29. *See Negonsott*, 507 U.S. at 103.
30. Act of June 8, 1940, Pub. L. 76-565, 54 Stat. 249 (1940) (codified as 18 U.S.C. § 3243 (1994)). Public Law 280, which applied to all of the states, would likewise be valid. *See infra* Part III.C.
31. *See Negonsott*, 507 U.S. at 106.
32. Talton v. Mayes, 163 U.S. 376, 380 (1896).
33. *See id.* at 384.

"existence of the right" of Congress to regulate did not, in and of itself, eliminate the retained sovereignty of the tribe.[34]

C. Congress Has Engaged in a Course of Conduct with Respect to Indian Nations and Indian Tribes That Has Resulted in a Complete Defeasance of the Retained Tribal Power and the Retained Sovereignty Which Was the Basis of the Court's Decision in Talton.

1. Talton v. Mayes

Significantly, *Talton* did not involve the power or authority of Indian tribes with respect to the rights of citizens of the United States. Rather, *Talton* involved "[t]he crime of murder committed by one Cherokee Indian upon the person of another."[35] The Court in *Talton* could not have treated the defendant as a United States citizen.[36] Therefore *Talton* did not determine the status of the Cherokee Tribe's retained sovereignty and authority to adjudicate the rights of citizens of the United States.

2. The Legislative Course of Conduct of Congress

Throughout history, Congress has engaged in a course of conduct that involved integrating Indians and their governments into the United States and reducing tribal powers to facilitate Indian integration into the existing political community. This conduct and some of the reasons for it were recognized by the Supreme Court more than one hundred sixty years ago:

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34. *See id.*

35. *Id.* at 381.

36. The Court did not indicate that the defendant was a citizen. Furthermore, Talton, the defendant, could not have been viewed as a citizen by the Court. At the time of *Talton* only the Allotment Acts had provided that Indians, not subject to special legislation, could become citizens. Act of February 8, 1887, ch. 119, 24 Stat. 388, 390. The Allotment Acts provided that one of the ways an Indian could become a citizen was to leave the reservation. *See* § 6, 24 Stat. at 390. In *Talton* the defendant was a Cherokee Indian on the reservation. *Talton*, 163 U.S. at 381. The other way the Acts provided for citizenship was for an Indian to become an allottee. *See* § 6, 24 Stat. at 390. At the time of *Talton*, the Supreme Court had not yet decided at what point in time the Allotment acts made Indian allottees, citizens. The Acts were unclear whether Indians were made citizens at the time of the allotment or twenty-five years later when the patent was issued. *In re Heff*, 197 U.S. 488, 504-05 (1905), decided this issue nine years after the decision in *Talton*. Thus, in *Talton* the defendant could not have been considered a citizen. *In re Heff* was later purportedly overruled by *United States v. Nice*, 241 U.S. 591 (1916). This purported overruling does not change the fact that the issue of when citizenship accrued had not been decided at the time of *Talton*.

> The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government, in the extinguishment of their title. . . . [A] sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities.
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> At best they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.[37]

a. Citizenship of Indians Diminished or Eliminated Tribal Sovereignty That Was Inconsistent with the Constitutional Rights of Citizens.

As Congress made Indians citizens of the United States—a process completed in 1924, almost thirty years after *Talton*—any retained sovereignty of tribes was diminished and eliminated insofar as it was inconsistent with the rights of citizens of the United States.[38] Congress did not have the right or the power to grant Indians rights different from the rights of other citizens of the United States. In other words, Congress could not make Indian citizens second-class citizens.

The Court has addressed the issue of whether Congress may compromise the rights of citizens, and it has consistently held that Congress does not have such power. In *Reid v. Covert*,[39] the Supreme Court considered whether the rights of citizens of the United States living abroad were somehow limited because of

37. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 593-94 (1832) (M'Lean, J., concurring).

38. As discussed, the very process of making Indians, citizens, imposed the Constitution on tribes. Also in *Rassmussen v. United States*, 197 U.S. 516, 527 (1905), the Court indicated that the application of the Constitution was "self-operative."

39. 354 U.S. 1, 3-5 (1956).

treaties signed by the United States.[40] The Court held that Congress did not have the power to limit the rights of its citizens by treaty, even if those citizens were living outside the United States. The Court based its analysis on the fact that Congress does not have the power to act outside the Constitution at all.[41]

In *Elk v. Wilkins*,[42] decided before the enactment of general acts granting Indians citizenship, the Court held that tribal membership was inconsistent with citizenship. The Court viewed tribes as alien powers and reasoned that one could not become a citizen of the United States without giving up all allegiance to alien powers.[43] If contemporary tribes still possess *retained* sovereignty, then tribal members who are citizens of the United States have an allegiance to an alien power, which is precluded by *Elk*.[44]

Thus, when Congress made tribal members citizens of the United States, it necessarily eliminated any retained sovereignty of tribes which would require that tribal member citizens have an allegiance to an alien power. Also, Congress necessarily re-

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40. *See Reid*, 354 U.S. at 5.

41. *See id.* at 5-6, 16, 18 (plurality opinion). The Court held:

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution . . . .
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> . . . .
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> . . . The obvious and decisive answer to [the suggestion that Congress could, by treaty, limit the rights of U.S. citizens], of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution . . . .
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> . . . .
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> This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

Id.

42. 112 U.S. 94 (1884).

43. *See Elk*, 112 U.S. at 102.

44. Significantly, *Elk* was decided after the Act of March 3, 1871, which provided that Indian tribes were no longer independent nations or powers within the United States, and that fact is referred to in the opinion. *Elk*, 112 U.S. at 107. When discussing an Indian who had become a citizen, the Court noted that he was from one of those Indian nations which "have totally extinguished their national fire, and submitted themselves to the laws of the states," or from a tribe which had "lost the power of self-government." *Id.* at 108. In other words, he did not have an allegiance to an alien power and thus he could be a citizen.

moved any retained powers of tribes inconsistent with the Constitutional rights of Indians as citizens.[45] Before Congress made any Indians citizens, the Supreme Court had indicated that all citizens must have the same rights. In 1824, Chief Justice Marshall stated:

> A . . . citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. *The constitution does not authorize Congress to enlarge or abridge those rights.*[46]

Surprisingly, dicta in *Duro v. Reina*[47] suggested that Indians who are tribal members are second-class citizens, in that they may not have the same rights, vis-a-vis their own tribes, that other citizens—even Indians who are not members of that tribe—have. The Court in *Duro* determined that tribal court jurisdiction did not apply in a criminal matter to an Indian citizen who was not a tribal member, and stated:

> Retained criminal jurisdiction over members is accepted by our precedents and *justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.*[48]

It would come as a great surprise to the 1924 Congress and to many tribal members that Indian citizens are "consenting" to tribal membership and thus are waiving their constitutional rights vis-a-vis the tribe. Such a concept is contrary to the rest of constitutional law.[49] Rather, it is likely that Congress thought it had abolished tribal government.[50] In any event, Congress clearly did not intend for Indians to be subject to unconstitutional actions of tribes when it began granting citizenship to Indians.

Congress, prior to 1924, had granted some Indians citizen-

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45. *See* Reid v. Covert, 354 U.S. 1, 5-6 (1957).

46. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824) (emphasis added); *see also* In re Heff, 197 U.S. 488, 504 (1905).

47. 495 U.S. 676 (1990).

48. *Duro*, 495 U.S. at 694 (emphasis added).

49. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938). "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and we 'do not presume acquiescence in the loss of fundamental rights.'" *Id.* (footnotes omitted).

50. *See supra* Part III.B.

ship.[51] Significantly, Congress chose to grant citizenship to Indians who received allotments under the Allotment Acts (the Dawes Act),[52] since Congress clearly did not intend for Indian reservations or tribes to survive the allotment process.[53] The Allotment Acts also granted citizenship to Indians who voluntarily took up residence apart from any tribe of Indians.[54] The Acts themselves provided that the Indian citizens could not be deprived of equal protection by either the state or territory in which they resided.[55] The dicta in *Duro* notwithstanding, traditional constitutional law principles, including equal protection,[56] would require that when Congress granted citizenship to all Indians, it eliminated any power or retained sovereignty of tribes inconsistent with the Constitution.[57]

b. Allotment Acts

The General Allotment Act (Dawes Act) granted the President authority to allot portions of reservation land to tribal members, and (with tribal consent) to sell the surplus lands to white settlers.[58] In *Montana v. United States*[59] the Court clearly stated that the congressional intent and policy that drove the

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51. *See, e.g.*, General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified in scattered sections in 25 U.S.C. §§ 331-358 (1994)); ch. 818, 25 Stat. 392 (1888) (codified as 25 U.S.C. § 182 (1994)) (Indian women marrying white men); ch. 95, 41 Stat. 350 (1919) (repealed by Nationality Act of 1940, 8 U.S.C. § 501) (Indians who served in military during World War I).

52. *See* General Allotment Act, ch. 119, 24 Stat. 388, 390 (1887).

53. *See infra* Part III.C.2.b.

54. *See infra* Part III.C.2.b.

55. *See infra* Part III.C.2.b. Congress obviously felt that its Indian citizens would not be residing on reservations, since only states and territories were mentioned.

56. The Supreme Court has made it clear that all citizens are to be treated as equal. *See infra* Part III.E.

57. Interestingly, the Supreme Court appears to ignore the fact that Indians are citizens. This may be because not all Indians have been citizens, even after the 1924 act (because of the birth requirements). Thus, for example in *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978), the Court held that a tribe could punish its member based on retained sovereignty. The Court based part of its analysis on the distinctions between Indians and citizens. The Court's analysis relates to acts of Congress which pre-date Indian citizenship. *See id.* Clearly the Court does not address the issue of whether the retained sovereignty of tribes was diminished by Congress when it made tribal members citizens of the United States, or whether tribes are required to treat their citizen members in a constitutional manner.

58. *See* DeCoteau v. District County Court, 420 U.S. 425, 432 (1975). When the tribes did not consent, then Congress, at times, provided for sale without consent of the tribes. *See* Hagen v. Utah, 510 U.S. 399 (1994).

59. 450 U.S. 544 (1981).

General Allotment Act and subsequent allotment acts was the abolition and dissolution of tribes and tribal government.[60] In its analysis the Court stressed that Congress never intended for non-Indians who settled on reservations—having purchased allotted lands—to be subject to tribal regulatory authority.[61] The Court concluded that:

> *It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction* when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.[62]

The recognition by the *Montana* Court that Congress, by the Allotment Acts, intended to abolish tribes and tribal relations and never intended for non-Indians to be subject to tribal regulatory authority is in absolute conflict with the dicta elsewhere in the opinion. That dicta suggests that tribes have retained some inherent, sovereign power to exercise civil jurisdiction over non-Indians on reservations.[63] The issue is not whether the tribes

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60. The Court stated:

> The policy of the Acts was the eventual assimilation of the Indian population and the "gradual extinction of Indian reservations and Indian titles." . . . And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished in part by the dissolution of tribal relations.

Montana, 450 U.S. at 559 n.9 (citations omitted). In the Allotment Acts Congress never intended that non-Indian citizens who settled on reservations would ever be subject to tribal authority.

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. *Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction.*

Id. (citations omitted) (emphasis added).

61. *See id.*

62. *Id.* (emphasis added)

63. In dicta, the *Montana* Court stated:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted). The "[t]o be sure" language in *Montana*, indicating that tribes *retain* inherent sovereign power over non-Indians, is also in direct conflict

have power over non-Indians, however limited, but whether the power is a *retained* power.

The Court noted in language which followed the above-quoted discussion of congressional policies and intent[64] that these policies were "repudiated" in 1934 by the Indian Reorganization Act.[65] This "repudiation," however, did not result in reinstatement of "retained inherent sovereign" power. Rather, the Indian Reorganization Act, to the extent that it "repudiated" prior congressional action, did so by granting power to tribes and providing for the possibility of restoring the reservations. The source of that power, however, was not the retained, inherent sovereignty of the tribes, but was the United States.[66] By 1934, the retained, inherent power of tribes was abolished.

The Allotment Acts were a *de jure* elimination of the retained powers of the tribes.[67] By instantly making some Indians citizens, they resulted in *de facto* elimination of powers.[68] The powers which tribes now have are not retained powers. Rather, they are new powers, given to them by Congress and are subject to the Constitution.[69]

Dawes, himself, apparently thought his law would make Indians part of the nation, bringing them under the "shelter" of the Constitution.[70] Based on the language in *Montana*, Con-

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with the language in *Montana* which immediately precedes it:

> Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied *support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.*

Id. at 565 (footnote omitted) (emphasis added).

64. This indicated that Congress did not intend for tribes to survive the allotment process.

65. *Montana*, 450 U.S. at 559 n.9.

66. Such a grant of power, is of the same kind as the grants of power which Congress has historically given to Territories. The Court in *Montana* in its dicta is treating the repudiation by Congress of prior policy as restoring retained sovereignty. As will be discussed, that is not possible. Tribes would appear to have, among the sovereign powers given to them by the United States, limited inherent powers. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324 (1819). These inherent powers would, however, be subject to Constitutional constraints. *McCulloch*, 17 U.S. (4 Wheat.) at 324. Perhaps the Court was using "retained" in this sense.

67. *See Montana*, 450 U.S. at 559 n.9.

68. *See In re Heff*, 197 U.S. 488, 504 (1905). *See generally infra* Part III.E. The Act itself provided that when it made an Indian a citizen, that citizen "is entitled to all the rights, privileges, and immunities of such citizens . . . ." 24 Stat. 390; *see also Hagan v. Utah*, 510 U.S. 399, 411 (1994), which held that settlement of reservations by non-Indians was a *de facto* diminishment of reservations and tribal powers. Certainly, making tribal members citizens had a similar impact.

69. *See infra* Part III.E.

70. *See* BORDEWICH, *supra* note 5, at 119.

gress as a whole did not appear to have had a different intent.[71] When discussing the passage of the Allotment Acts, Indian scholar Francis Paul Prucha in his book *American Indian Policy in Crisis*,[72] quotes the language of Senator Richard Coke[73] as representative of the position of the sponsors of the Dawes Act:

> The policy of the bill is to break up this large reservation, to individualize the Indians upon allotments of land; *to break up their tribal relations and to pass them under the jurisdiction of the Constitution and laws of the United States* and the laws of the States and Territories in which the lands are situated . . . .[74]

The Supreme Court has also held that one of the effects of the Allotment Acts was the partial or complete diminishment of Indian reservations themselves.[75] In *Hagen v. Utah*[76] the Supreme Court held that the Uintah Indian Reservation was diminished by Congress when it enacted one of the numerous acts which constituted the General Allotment Act and its successors. The Court stated:

> In light of our precedents, we hold that restoration of unalloted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with continuation of reservation status.[77]

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71. *See Montana*, 450 U.S. at 559 n.9. Also in *In re Heff*, 197 U.S. 488 (1905), the Court adopted the position of the Solicitor General who stated:

> It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes subject to the laws of the state or territory in which he resides. As a matter of constitutional law, an Indian appears to be entitled to the benefit of, and subject to, the laws of the state in which he resides the moment he becomes a citizen of the United States. By virtue of the 14th Amendment a citizen of the United States becomes, by residence therein, a citizen of the state, and entitled to all the rights, privileges and immunities of other citizens of the state, and to the equal protection of its laws.

Id. at 504 (citations omitted).

72. FRANCES PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900 (1976).

73. Senator Coke preceded Dawes as the chairman of the Committee on Indian Affairs. At the time, Senator Coke was sponsoring a nearly identical measure.

74. PRUCHA, *supra* note 72, at 237 (emphasis added). Prucha indicates that Dawes himself credits Coke with the Allotment Acts. *See id.* at 248 n.51.

75. Although Congress clearly intended to ultimately eliminate reservations, such elimination is not necessary to the thesis of this article. The issue is whether tribal authority was eliminated, which it was.

76. 510 U.S. 339 (1941).

77. *Hagen*, 510 U.S. at 414.

As part of its analysis in *Hagen*, the Supreme Court looked at demographics subsequent to the Act to determine whether there was a practical acknowledgment that the reservation was diminished.[78] It found that on the opened lands, approximately eighty-five percent of the population was non-Indian. The Court concluded:

> This "jurisdictional history," as well as the current population situation in the Uintah Valley, demonstrates a practical acknowledgment that the Reservation was diminished; *a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area.*[79]

The *Hagen* Court also indicated that the non-Indian character of an area within a reservation may result in a *de facto* diminishment of a reservation: "On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation."[80]

The Allotment Acts are an emphatic example of congressional legislation[81] designed to accomplish the "dissolution of tribal affairs and jurisdiction."[82] As part of these Acts, Indians who either received allotments or who left the reservations were made citizens.[83] Congress thereby intended that Indians be in-

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78. *See id.* at 421.

79. *Id.* (emphasis added).

80. *Id.* at 411 (quoting Solem v. Bartlett, 465 U.S. 463, 471 (1984) ("Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.")).

81. In certain instances Congress had to try and try again. In *Hagen*, 510 U.S. at 416, 421, for example, the initial bill required tribal consent. When the tribe chose not to consent Congress passed another bill indicating that if the tribe did not consent the Secretary was directed to allot the lands in any event. That, in fact, is what happened. The Court upheld the diminishment without the consent.

82. Montana v. United States, 450 U.S. 544, 559 n.9. Indian scholar Francis Paul Prucha in his introduction to a book by another author indicates that the Allotment Acts "to many reformers . . . was the most important means of destroying tribalism." Francis Paul Prucha, *Introduction* to D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS at x (1973).

83. *See* OTIS, *supra* note 81, at 15 (indicating the importance of making Indians citizens as part of the allotment process).

> It makes understandable the entire subsequent working out of the allotment program. It was apparent that the Indian system was being smashed by the white economy and culture. Friends of the Indian, therefore, saw his one chance for survival in his adapting himself to the white civilization. He must be taught industry and acquisitiveness to fit him for his "ultimate absorption into the great body of American citizenship." *Making him a citizen and a voter would guarantee to him the protection of the rules under*

tegrated into the rest of society, with all of its rights and benefits. Felix S. Cohen, in his original *Handbook of Federal Indian Law*,[84] described citizenship as one of the "non-pecuniary benefits which the Indians are to receive *in view of the destruction of tribal property and tribal existence which the Act contemplates*."[85] Congressional intent was so clear that the government itself recognized that reservations had been abolished.[86]

c. Other Acts

After the Indian Appropriation Act of March 3, 1871, tribes were no longer regarded as sovereign nations.[87] Thus, tribes were no longer separate states as found in *Cherokee Nation v. Georgia*.[88] This obviously was a substantial diminishment of retained sovereignty.

Congress also passed numerous acts that provided for citizen travel through reservations, and for trade between Indians and non-Indians, both on and off reservations. The various Trade and Intercourse Acts[89] provided for such travel and commerce. Those Acts also provided for federal jurisdiction over crimes in Indian country which varied from time to time.[90] As time passed, the allowable intrusion into Indian country and affairs increased.[91]

To accomplish integration and to facilitate commerce, acts as early as 1899 provided for grants of rights of way across tribal and allotted lands for telephone and telegraph lines and offices.[92] Beginning in 1901, Acts provided for grants of public high-

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which the competitive game of life was played.

Id. (emphasis added)

84. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1941).

85. *Id.* at 79 (emphasis added).

86. For example, the Department of the Interior in its 1915 sale of allotted lands to the general public represented in its regulations that the lands for sale to non-Indians were within the "Former Flathead Indian Reservation, Mont." Department of Interior Regulations issued March 20, 1915.

87. *See* DeCoteau v. District County Court, 420 U.S. 425, 432 (1975). The Act provided in part that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or *power* with whom the United States may contract by treaty." Indian Appropriation Act of March 3, 1871, ch. 120, 16 Stat. 544, 566 (emphasis added).

88. 30 U.S. (5 Pet.) 1 (1831).

89. *See* COHEN, *supra* note 84, at 68-74.

90. See *id.* for a discussion of the various Trade and Intercourse acts.

91. *See id.*

92. In 1899, the Secretary of Interior was empowered to grant rights of way for railways, telephone lines, and telegraph lines. Act of Mar. 2 1899, ch. 374, 30 Stat.

way rights of way.[93] Other acts provided for the condemnation of allotted lands for any public purpose, under the laws of the state or territory.[94] The Act of April 17, 1926,[95] gave the Secretary the authority to enter into mining leases, without tribal consent, on certain reservation lands. Other legislation of the 1950s provided for transfers of Indian land to non-Indians[96] and for various rights of way for all purposes across land held in trust for individual Indians or tribes, without consent of the owner.[97] The Indian Long Term Leasing Act of 1955 allowed the Secretary of the Interior to approve leasing of most Indian Trust Lands.[98]

Other legislation related to the termination of tribes or to state jurisdictional rights over both civil and criminal matters concerning tribal members. For example, legislation in the 1950s and early 1960s was intended to terminate approximately 109 tribes and bands.[99] Of particular importance is Public Law 280.[100] As initially enacted, it provided for the transfer of criminal and civil jurisdiction over Indian lands from the federal to state governments in five states, and provided for the assumption of jurisdiction by all other states.[101] It did not provide for tribal consent.[102]

The foregoing statutes typify various acts of Congress relating to Indian tribes, Indian reservations, and the relationship between Indians and non-Indians. They show that Congress intended the complete assimilation of tribes into the United States.[103] Indian scholar Felix S. Cohen appears to agree with

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990 (codified as 25 U.S.C. § 312).

93. *See* Act of Mar. 3, 1901, ch. 832, 31 Stat. 1058, 1084 (codified as 25 U.S.C. § 311).

94. *See* COHEN, *supra* note 84, at 80.

95. Ch. 156, 44 Stat. 300 (codified as 25 U.S.C. § 400a).

96. *See* 25 U.S.C. § 483 (1994).

97. *See* 25 U.S.C. § 323-328 (1994).

98. *See* 25 U.S.C. §§ 396, 415-415d.

99. "Between 1954 and 1962 fourteen acts were passed requiring development of plans for terminating the federally recognized status of approximately 109 tribes and bands." AMERICAN INDIAN LAW DESKBOOK, *supra* note 4, at 24-25.

100. 25 U.S.C. §§ 1321-1325 (1994); 28 U.S.C. § 1360 (1994).

101. *See* 25 U.S.C. §§ 1321-1325 (1994); 28 U.S.C. § 1360 (1994).

102. *See* COHEN (Strickland ed.), *supra* note 6, at 175-77.

103. These acts together with the Allotment Acts show not only that Congress intended for Indians to be integrated into society, but that Congress intended that non-Indians have substantial access to reservations. Congress had to have known that the ultimate result of such access would be the daily inter-relationship which now exists between Indians and non-Indians on reservations. Congress cannot have intended that Constitutional protection of its citizens would depend on the random

this assessment. In describing Indian legislation after 1900, he indicates:

> The attempt to wind up tribal existence reaches a new high point and various powers formerly vested in the tribes are transferred by Congress to administrative officials.[104]

Thereafter, in describing an act which sets aside funds for individual Indians from the amounts which in prior legislation had been reserved for tribes, Cohen indicates:

> Section 28 of this act represents what is perhaps the culmination of the tendency to break up Indian tribes and tribal property . . . it is of a piece with legislation, already noted, looking to the complete dissolution of the Indian tribes and the division of tribal funds, as well as tribal lands among the members thereof.[105]

Although Congress restricted Indian sovereignty on an "as needed," piecemeal basis, it ultimately established a complete legislative plan for integrating Indians into the rest of society, and the reverse. No further, significant legislation was needed. The legislation, viewed as a whole, clearly shows that Congress intended to abolish tribes and reservations.[106]

The Supreme Court has recognized that, prior to 1934, tribes—as entities which had retained sovereignty and power—had in fact been abolished. In *Morton v. Mancari*,[107] the Court, in describing the reason for the Indian Reorganization Act of 1934,[108] stated:

> Congress was seeking to modify the *then-existing situation* whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes.[109]

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luck of whose land they were on and the percent of Indian blood of the person they were dealing with. Rather, Congress was required to protect its citizens and is presumed to have done so. *See infra* Part III.D.

104. COHEN, *supra* note 84, at 82.

105. *Id.*

106. The Allotment Acts, for example, intended that all of the land within each reservation be allotted to tribal members (who then became U.S. citizens) who would receive a patent for the land in twenty five years, or to non-Indians after transfer to the United States who would get patents immediately. *See* COHEN, *supra* note 84, at 78-79.

107. 417 U.S. 535 (1974).

108. *See infra* Part III.D.

109. *Morton*, 417 U.S. at 542 (emphasis added).

Prior to 1934, there was a complete defeasance of tribal sovereignty.

D. To the Extent That Congress Has Attempted to Revive Tribal Power and Sovereignty, It Was Precluded from Providing for the Creation of Any Tribal Governments or Tribal Judicial Systems That Did Not Comply with the Constitution of the United States.

Based on the acts of Congress and the response of the citizens to those Acts,[110] prior to 1934 there was a *de facto* and a *de jure* defeasance and abolition of any retained powers of tribal government. In 1934, Congress changed course with respect to its view of the proper status of Indian tribes.[111] Recognizing that, for all practical purposes, it had eliminated Indian tribes, Congress sought to revive them.[112]

In 1934, Congress passed the Indian Reorganization Act.[113] The Act gave tribes the right to organize, to adopt constitutions and bylaws,[114] and to have certain powers in addition to those vested by existing law.[115] The Act further provided for tribal incorporation, which vested tribes with the power to purchase property, to conduct business, and to sell land.[116] The Act gave the Secretary of the Interior the power to provide for new Indian reservations and to add land to existing reservations.[117]

In providing for the organization of tribal governments in 1934, Congress started with a clean slate. The new tribal governments received their power from Congress. Clearly Congress can only establish governments and courts for its citizens that comply with, and are subject to, the Constitution of the United

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110. *See supra* Part III.C.2.

111. As noted *supra*, the course change was only temporary, and Congress continued to pass legislation relating to the elimination of tribes and reservations, even if such legislation was redundant.

112. *See* AMERICAN INDIAN LAW DESKBOOK, *supra* note 4, at 21. "The Indian Reorganization Act of 1934 (IRA) was intended to reverse the General Allotment Act's policy of weakening, *if not wholly destroying the status of tribes as self governing entities.*" *Id.* (emphasis added).

113. *See* 25 U.S.C. §§ 461-479 (1994).

114. To be approved by the Secretary of the Interior. *See* 25 U.S.C. § 476(a) (1994).

115. *See* 25 U.S.C. § 476(e) (1994). It would appear that "existing law" would refer to other acts of Congress such as the Department Appropriations Act of 1888, 25 Stat. 217, 233, which provided for the Court of Indian Offenses, now called "CFR Courts" under 25 C.F.R. § 11 (1997). *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 n.7 (1978).

116. *See* 25 U.S.C. § 477 (1994).

117. *See* 25 U.S.C. § 467 (1994).

States.[118] With respect to territories of the United States, Congress started with a clean slate as well.[119] In *United States v. Kagama*[120] the Supreme Court suggested that Congress' power over territorial governments and Congress' power over tribes has the same basis. Also, as is the case with tribes, Congress has plenary power over territories.[121]

The Supreme Court has consistently held that when Congress establishes governments and courts in territories it must require that the resulting government comply with the United States Constitution.[122] In *Rassmussen v. United States*[123] the Court held that Congress, in establishing the Territory of Alaska, did not have the power to provide for a jury trial that did not comply with the Sixth Amendment.[124] In its analysis the Court concluded that the Constitution was self-operative, and that the Constitution applied to the territories even if Congress did not so indicate.[125] Thus, the Court held that where Congress, in establishing laws for the Territory of Alaska, did not comply with the

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118. *See* Reid v. Covert, 354 U.S. 1, 12-14 (1957).

119. *See* Simms v. Simms, 175 U.S. 162, 167-68 (1899) (holding that with respect to the territories Congress has complete dominion and legislative power and may delegate that power to the legislative assembly of a territory); United States v. McMillan, 165 U.S. 504, 510-11 (1897); Shively v. Bowlby, 152 U.S. 1, 48 (1894) (holding that Congress has complete power over the territories).

120. 118 U.S. 375, 379-81 (1886).

121. *See* El Paso & N.E. Ry. Co. v. Gutierrez, 215 U.S. 87, 93 (1909).

122. Except in the so called "Insular Cases" which dealt with the application of the Constitution to *unincorporated* territories of the United States, such as Puerto Rico. *See* Balzak v. People of Puerto Rico, 258 U.S. 298 (1922). Arguably, even this exception has been laid to rest. *See* Reid v. Covert, 354 U.S. 1, 12-13 (1957). Even if the Insular Cases are still viable, they are not applicable to Indian Tribes which *are part of the United States*. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831).

123. 197 U.S. 516 (1905).

124. *See Rassmussen* 197 U.S. (Pet.) at 526-27.

125. The Court stated:

> Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory *was a part of the United States* the inhabitants thereof were entitled to the guaranties of the Fifth, Sixth, and Seventh Amendments, and that the act or acts of *Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution.* It is true that, in some of the opinions, both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no reference to such statutes was made, and the cases proceeded upon a line of reasoning leaving room for no other view than that the conclusion of the court was rested upon the *self-operative application of the Constitution.*

Id. at 526-27 (emphasis added).

requirements of the Constitution, those laws were void.[126] In *Thompson v. Utah*[127] the Court held that even where the action had arisen prior to Utah becoming a state, the Constitution applied.[128] The fact that Congress must legislate in a manner consistent with the Constitution is emphasized by the Court's holding that Congress must comply with the Constitution when it passes laws requiring state action.[129]

As previously noted, *Reid v. Covert*[130] indicates that Congress has no power to act outside the Constitution. "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."[131] Thus, to the extent that Congress has restored Indian powers and even Indian sovereignty, it was required to—and was presumed to—impose constitutional requirements. Because of the self-implementing nature of the Constitution, Congress did not need to expressly apply or refer to the Constitution in its legislation.

When Congress passed the 1934 Indian Reorganization Act,[132] it provided for the establishment of tribal governments

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126. *See id.* at 528. The Court in its analysis relied upon a case arising from the Territory of Montana. *See* Kennon v. Gilmer, 131 U.S. 22 (1889). There the Court concluded:

> The Seventh Article of Amendment of the Constitution declares that, "in suits as common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." This article of the Constitution is in full force in Montana, as in all other organized territories of the United States.

Id. at 28.

127. 170 U.S. 343 (1898).

128. *See Thompson* 170 U.S. at 346-47 (quoting Springville City v. Thomas, 166 U.S. 707 (1897)). The Court stated:

> That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question . . . . "In our opinion, the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of *Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.*"

Id. (emphasis added).

129. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause.).

130. 354 U.S. 1 (1957).

131. *Reid* 354 U.S. at 5-6 (footnotes omitted).

132. The Act, codified at 25 U.S.C. §§ 461-479 (1997), provided for Tribal constitutions under section 476 and Tribal charters under section 477. The tribal constitu-

which were subject to the Constitution. In *Springville City v. Thomas*,[133] the supreme court of the Territory of Utah had held that the organic act of the territory had vested the territory's legislature with nearly unlimited power.[134] The territory's supreme court then held that the territory's legislature could change the number of jurors which were necessary to reach a verdict in a civil action from the unanimous verdict required by the Seventh Amendment.[135] The United States Supreme Court reversed, stating:

> [T]he [territorial] court held in effect that the act of Congress was constitutional, although it empowered the territorial legislature to provide for verdicts by less than the whole number of jurors. The question involved was not [a] matter of construction of the territorial act, but the court discussed its validity, and this depended on the validity of the act of Congress giving it the scope which the court attributed to it.
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> In this there was error. In our opinion, the Seventh Amendment secured unanimity finding a verdict as an essential feature of trial by jury in common-law cases, and the act of *Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.*[136]

Historically, the Court has held that the Indian Commerce Clause[137] created a special relationship with Indian tribes. For example in *Morton v. Mancari*,[138] the Court noted that this special relationship "singles Indians out as a proper subject for separate legislation."[139] In *Santa Clara Pueblo v. Martinez*,[140] the Court indicated the relationship with Indian tribes has "always been . . . anomalus . . . and of a complex character."[141]

Some might argue that this special relationship "changes the rules" when Congress legislates with respect to Indian tribes, and that Congress is not required to impose the same constitu-

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tions had to be approved by the Secretary of the Interior. The tribal charters were to be issued by the Secretary of Interior. As indicated *supra*, Congress could not have provided that the Secretary of the Interior act in an unconstitutional manner.

133. 166 U.S. 707 (1897).

134. *See Springville City*, 166 U.S. at 708.

135. *See id.*

136. *Id.* at 708-09 (emphasis added); *see also* Thompson v. Utah, 170 U.S. 343, 346-47 (1898).

137. U.S. CONST. art. I, § 8, cl. 3.

138. 417 U.S. 535 (1974).

139. *Morton*, 417 U.S. at 552.

140. 436 U.S. 49 (1978).

141. *See Santa Clara Pueblo*, 436 U.S. at 71 (internal quotation marks omitted).

tional restraints in such legislation. Such a position ignores the clear language in the preceding cases with respect to the constitutional limitations on the powers of Congress. The position also has been expressly rejected by the Supreme Court.

In *Seminole Tribe of Florida v. Florida*,[142] the Court held that the power granted to Congress by the Indian Commerce Clause would not overcome other constitutional constraints on Congress.[143] In *Lyng v. Northwest Indian Cemetery Prot. Assn.*,[144] the Court held that Indian religious rights on federal lands were not enhanced, stating "[t]he First Amendment must apply to all citizens alike."[145] Further, the Supreme Court has expressly stated that when Congress attempts to delegate powers to tribes, it can only grant powers which are subject to the constraints of the Constitution. In *Duro v. Reina*,[146] the Court stated:

> Had the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the tribe's dependent status, and could only have come to the Tribe by delegation from Congress, *subject to the constraints of the Constitution*.[147]

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142. 517 U.S. 44 (1996).

143. In holding that the limitation of the Eleventh Amendment was a limitation on the power of Congress, despite the Indian Commerce Clause, the Court stated:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

Seminole Tribe of Florida, 517 U.S. at 72-73.

144. 485 U.S. 439 (1988).

145. *Id.* at 452.

146. 495 U.S. 676 (1990).

147. *Duro*, 495 U.S. at 686 (emphasis added). Congress has attempted to reverse *Duro* by passing an amendment to the Indian Civil Rights Act which purports to recognize and reaffirm the inherent powers not recognized in *Duro*. 25 U.S.C. § 1301(2) (1994). Congress may have been attempting to circumvent the requirement that it impose constitutional restraints with respect to the exercise of criminal jurisdiction over non-tribal member Indians, which was the power not recognized by *Duro*. Both the language in *Duro*, and the holding in *Reid v. Covert*, 354 U.S. 1 (1957), would appear to preclude this. *See generally* Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned it: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993).

Thus, tribes operating under the Indian Reorganization Act[148] were required to establish constitutions and tribal governments which were subject to guarantees found in the United States Constitution.[149] However, they have not all done so. While some tribes may contend otherwise, clearly tribal governments have constitutional problems. This fact has been recognized by both Congress and the Supreme Court.[150] Requiring tribes to comply with the Constitution will either change the way in which tribes function, or will reduce their jurisdiction to include only those tribal members who, in fact, waive their constitutional rights with respect to conduct on tribal lands.

E. Impact on Tribes of Constitutional Requirements

Tribes are not states[151] and therefore the Fourteenth Amendment does not apply to them. Rather, because tribes now derive their power from Congress, the constitutional law that

148. All provisions of this act do not apply to all tribes. *See* 25 U.S.C. §§ 473, 478, 478-1; *see also*, AMERICAN INDIAN LAW DESKBOOK, *supra* note 4, at 22 (indicating that 195 tribes have elected coverage or are deemed to have elected coverage). Seventy-seven tribes, where the Act does not apply, or where coverage was rejected, may have extremely limited powers, because they do not have any congressional basis for their governments. Congress has given them power in other acts, such as the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301-1303 (1997). Any such granted power would be subject to the Constitution. In any event, any powers they are exercising with respect to citizens, whether by congressional act or inherent power, would be subject to the Constitution because of its self implementing nature.

149. In Montana, reservations where tribal governments are organized pursuant to the 1934 Act are: the Blackfeet Reservation; the Flathead Reservation; the Fort Belknap Reservation; the Rocky Boy Reservation; and the Tongue River Reservation (Northern Cheyenne). *See* PETER C. MAXFIELD, ET AL., NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 313 (1977).

150. *See supra* note 4 and accompanying text. Also in its discussion of the Indian Civil Rights Act, 25 U.S.C. §§1301-1303, the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), quoted the bill's chief sponsor as saying that the bill "should not be considered as the final solution to the many serious constitutional problems confronting the American Indian." *Id.* at 71. The Court indicated that Congress recognized that there were abuses of tribal power, but had decided to address the most serious abuses first in the ICRA. If the thesis of this paper is correct, there was no need to enact the Indian Civil Rights Act to provide constitutional protections to tribal members. The fact that Congress enacted the ICRA is not an indication that prior congressional acts did not abolish tribal sovereignty or that Congress has not already imposed the requirement that tribes comply with the Constitution. *See* Hagen v. Utah, 510 U.S. 399, 420 (1994). "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Id.* (quoting a series of earlier cases, indicating that the rule is "our long standing observation").

151. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

has developed with respect to the conduct of the federal government should govern the conduct of tribes.[152] The constitutional equal protection requirements relating to voting and jury trials are significant because they relate to the power of tribes to impact non-tribal members. Tribal member citizens will tend to have more traditional constitutional issues (such as due process) with respect to whether their government is treating them fairly. Clearly, however, requiring tribes to function in a manner consistent with the Constitution will change the nature of most tribes.

The Fourteenth Amendment provides equal protection for citizens of states.[153] On its face, however, the Fourteenth Amendment operates as a limitation on states and not on the federal government. Because tribes now derive their power from the federal government, other constitutional provisions determine the extent of equal protection.

The due process clause of the Fifth Amendment has traditionally been viewed as providing some standard of equal protection with respect to actions of the federal government. It is now clear that the Fifth Amendment provides for the same protection as the express equal protection language of the Fourteenth Amendment. "'[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government' than it does on a State to afford equal protection of the laws."[154] Thus, the standard of providing for equal protection by tribes should be the same as the standard for states and the federal government from which tribes derive their power. Thus, those Supreme Court cases establishing equal protection standards for states apply equally to tribes.

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152. It is obviously beyond the scope of this article to discuss the complete extent of this law.

153. The Fourteenth Amendment provides in part, "nor shall any State deprive any person of . . . equal protection of the laws." U.S. CONST. amend. XIV.

154. This longstanding constitutional principle was reinstated in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 225 (1995) (quoting Bolling v. Sharpe, 347 U.S. 397, 400 (1953)). The Court stated:

> As we have explained, *Metro Broadcasting* [which the Court expressly overruled] undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over fifty years. Those principles together stood for an "embracing" and "intrinsically soun[d]" understanding of equal protection "verified by experience," namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws.

Id. at 231-32 (citations omitted).

Applying equal protection requirements to tribes should change voter qualification requirements where the tribe has attempted to assert jurisdiction over non-members.[155] The non-members under those circumstances should have the right to vote in tribal elections. This is because of the basic constitutional requirement that citizens be allowed to vote for those individuals their govern our lives.

> No right is more precious in a free country than that of *having a voice in the election of those who make the laws under which, as good citizens, we must live*. Other rights, even the most basic, are illusory if the right to vote is undermined.[156]

In the landmark case of *Baker v. Carr*,[157] the Supreme Court rejected the proposition that voting issues were only political questions and were not justiciable.[158] Since then the Court has indicated that the equal protection clause applies to laws relating to the regulation of elections.[159] For example, the Supreme Court in *Quinn v. Millsap*[160] struck down a provision of the Missouri Constitution which provided that in certain instances the electorate was required to be composed of freeholders.[161] Finding that the provision denied equal protection, the Court stated:

> The rationale of the Missouri Supreme Court's contrary decision would render the Equal Protection Clause inapplicable even to a requirement that all members of the board be white males. This result, and the reasoning that leads to it, are obviously untenable.[162]

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155. Any tribe that limits its legislation on its face to strictly tribal members on tribal lands or tribal member lands would not appear to have constitutional problems with excluding non-tribal members from voting. However, where a tribe purports to exercise either regulatory or judicial authority over non-members (even if, in fact, it has no jurisdiction) it would appear to have constitutional problems with excluding non-members from voting in elections for tribal governing bodies and excluding non-members from those bodies, as will be shown.

156. Williams v. Rhodes, 393 U.S. 23, 31 (1968) (footnote omitted) (emphasis added).

157. 369 U.S. 186 (1962).

158. *See Baker*, 491 U.S. 186.

159. *See, e.g., Williams*, 393 U.S. at 29.

160. 491 U.S. 95 (1989).

161. *See Quinn*, 491 U.S. at 106-07.

162. *Id.* at 106. The Court held that the equal protection clause was applicable even though the board was a form of public service and could only recommend proposals to the electorate. *See id.* at 105. Certainly election of tribal legislators, who purport to legislate for non-members would be subject to the same constitutional constraints.

Where tribal governing bodies purport to make laws or rules that impact non-members residing within the confines of a reservation, then the Constitution requires that non-members be allowed to vote in elections and to run for office. Tribal membership and the related voting requirements are based on race.[163] If tribes seek to govern non-Indians, they cannot make race-based distinctions for voting requirements.[164] Where the decisions of a tribe may impact non-Indian citizens on a reservation, equal protection requires that those citizens be given the right to vote in tribal elections.[165]

The same equal protection requirements apply with respect to tribal juries. Selection of juries in cases involving non-tribal members, from a class of individuals containing only tribal members cannot survive constitutional scrutiny. In *Georgia v. McCollum*[166] and *Edmonson v. Leesville Concrete Co.*,[167] the Supreme Court held that selection of jurors in either criminal or civil cases based on race was an unconstitutional violation of the equal protection clause. The basic principle is one of long standing. After the Fourteenth Amendment, but before the Nineteenth Amendment (providing for women's suffrage), the Court in *Strauder v. West Virginia*[168] struck down a West Virginia statute which provided that only white males could serve on juries. The Court held that one race could not exclude another race from juries.[169] *Batson v. Kentucky*[170] expressly reaffirmed the

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163. *See* 25 U.S.C. § 479 (1994) (defining Indian in terms of Indian descent or Indian blood). In *Montoya v. United States*, 180 U.S. 261, 266 (1901), the Court stated "[b]y a 'tribe' we understand a body of Indians of the same or a similar race."

164. *See* Reynolds v. Sims, 377 U.S. 533, 557-61 (1964) (stating that voter qualifications cannot be race-based).

165. *See* Evans v. Cornman, 398 U.S. 419 (1970) (holding that individuals living on a Federal enclave within the State of Maryland who were impacted by State laws were, because of the requirements of equal protection, entitled to vote in Maryland elections).

166. 505 U.S. 42, 55-56 (1992).

167. 500 U.S. 614, 628-29 (1991).

168. 100 U.S. 303 (1879).

169. *See Strauder*, 100 U.S. at 308.

> That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws.

principles of *Strauder*. In *Batson*, the Court quoted *Strauder*, stating:

> The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, *persons having the same legal status in society as that which he holds*.[171]

As citizens, non-tribal members should be entitled to a jury which does not exclude non-tribal members.[172] Although the Secretary of the Interior may have approved tribal constitutions and court systems which allow only tribal members to vote and to serve on juries, the Secretary did not have the power to do so, because Congress could not give him that power.[173]

F. Remedies

This discussion means nothing unless courts have the power to remedy unconstitutional tribal acts. Because tribes do not have the power to act in an unconstitutional manner, courts—including tribal courts—should hold that where constitutional tests are not met, tribes lack the jurisdiction to act.[174]

Courts can refuse to enforce unconstitutional tribal judgments. The Court of Appeals for the Ninth Circuit recently held

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Id.

170. 476 U.S. 79 (1986).

171. *Batson*, 476 U.S. at 86 (emphasis added).

172. Tribal members should not be excluded either. No individual should be excluded simply on the basis of race.

173. *See* Thompson v. Utah, 170 U.S. 343, 346-47 (1898).

174. Tribal courts, of course, may recognize the validity of what has been said here and refuse to enforce tribal acts and tribal powers which are unconstitutional. Tribal courts can also implement the proper equal protection and due process procedures in their courts. With respect to other courts, *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), holds that to the extent that retained sovereignty of tribes has been diminished and the power to act has not been replaced by congressional action then tribes lack the jurisdiction (power) to act. If, retained sovereign powers have been eliminated to the extent that they are inconsistent with the Constitution, they have not been replaced by powers, even inherent powers which are inconsistent with the Constitution. Thus tribes have no power to act in an unconstitutional manner. *Strate* also holds that a federal district court may, in the first instance, determine the jurisdiction of a tribe where it is evident that tribal courts lack adjudicatory authority. *See id.* at 1416 n.14.

The rule precluding federal court jurisdiction in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), does not apply, because the Court in *Martinez* was looking only at whether Congress had provided for jurisdiction in connection with the Indian Civil Rights Act. District court jurisdiction here would be based on general constitutional principals, and not on the Indian Civil Rights Act.

that a Blackfeet tribal judgment "may neither be recognized nor enforced in the United States Courts."[175] In its analysis as to why it withheld comity, the Court stated "[a] federal court must also reject a tribal judgment if the defendant was not afforded due process of law."[176]

Federal courts would also have the power to impose the Constitution on tribal activities. In *Missouri v. Jenkins*,[177] the Supreme Court ruled that a federal district court could order a school district to levy property taxes which would be necessary to fund a desegregation remedy, and that it could enjoin the operation of state laws which would have prevented the school district from imposing the required taxes.[178] In *Jenkins* the Supreme Court held that federal courts have the power to remedy unconstitutional conduct on the part of governments. Utilizing the same power, federal courts could enjoin tribal laws and procedures which would lead to an unconstitutional result. For example, a federal court could enjoin the prosecution of suits in tribal court where the jury selection process was unconstitutional or could bar tribal elections which were unconstitutional.[179]

Although tribes have sovereign powers, they are powers derived from the United States, and are not retained powers. While tribes themselves may have sovereign immunity in some circumstances, this immunity should not extend to tribal officials or entities when they act in an unconstitutional or illegal manner.[180] Thus, such officials would be subject to suit in federal court. The laws passed and the decisions rendered would be subject to review for the constitutional validity of the process.[181]

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175. Wilson v. Marchington, 127 F.3d 805, 815 (9th Cir. 1997).

176. *See Wilson*, 127 F.3d at 811.

177. 495 U.S. 33 (1990).

178. *See Jenkins*, 495 U.S. at 51.

179. *See generally* Williams v. Rhodes, 393 U.S. 23, 34-35 (1968) (upholding an injunction issued by a three judge district court ordering the Governor of Ohio to change Ohio's election process to comply with Constitutional requirements).

180. *See generally* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 858-59, 868 (1824).

181. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). This does not answer the question of whether such decisions would otherwise be subject to review for their correctness if the process was otherwise constitutional. That issue is beyond the scope of this article.

IV. CONCLUSION

The perception that the Constitution of the United States does not apply to the conduct of Indian tribes is not valid. When Congress eliminated the nation status of tribes, opened reservations for commerce and settlement by its citizens, and provided for Indians' citizenship, it left no room for tribes to have powers which are inconsistent with the Constitution. To paraphrase the Court in *Montana*, it defies common sense to believe that Congress would have intended to provide for the complete integration and assimilation of tribes and reservations into the fabric of society and yet to have intended that tribes retain sovereignty to directly impact the lives of its citizens (both tribal members and non-tribal members) without constitutional accountability.[182] When it resurrected tribes, Congress necessarily imposed the Constitution.

182. *See* Montana v. United States, 450 U.S. 544, 559 n.9.